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EU SIM CHUAN

v.

KRIS ANGSANA SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[CIVIL SUIT NO: S2(S5)-22-432-1997]
22 OCTOBER 2006

C ***TORT:*** *Damages - Negligence - Property suffered structural damages- Whether there was negligence on defendant's part in carrying out construction work that led to damages caused to plaintiff's bungalow - Whether defendant took precautionary or preventive steps and measures before commencing works - Whether defendant liable*

D ***TORT:*** *Damages - Quantum for damages - Assesment of - Whether allowed*

The plaintiffs, husband and wife, were owners of a property at No.290A, Lorong Palas, Off Jalan Ampang on which was
E constructed a double storey bungalow house ('the said property'). The property was registered in the name of the wife (the first plaintiff) but the purchase of the said property was wholly financed by the husband, the second plaintiff (PW1). Both husband and wife had been living together in the said bungalow
F house together with their children until it was damaged by the defendant which led them to bring this action against the defendant. The facts were that the defendant was developing the land immediately adjacent to the said property to construct two 20 storey condominium blocks. Part of the initial works carried out
G by the defendant were piling activities which involved excavation and removal of soil. Such activities had caused movement and settlement of the underground soil which in turn caused damages to the plaintiffs' bungalow house which developed cracks in various parts of the building including the compound of the said
H bungalow. The plaintiffs and their family, on the advice of their engineer, vacated the said bungalow house for fear of their safety. On inspection by the plaintiffs' engineer, the bungalow had suffered structural damages particularly the existence of cracks on the floor area, the walls, column and beam. In this action, the
I plaintiffs alleged that the defendant had been negligent in carrying out the construction works adjacent to their bungalow house. The issues to be determined were (i) whether there was negligence on

the part of the defendant in carrying out the construction work that led to damages caused to the plaintiff's bungalow and (ii) the quantum of damages payable by the defendant to the plaintiff.

Held (allowing plaintiff's claim for damages in the sum of RM6,306,242.43):

(1) The defendant, who employed engineers for carrying out such construction works, must be fully aware that the activities it carried out at the work site would likely cause damages to the plaintiff's bungalow house and should therefore take the necessary steps to prevent damages to the plaintiff's house. There was no action taken by the defendant in the form of any precautionary or preventive steps and measures before commencing works. None of the four witnesses called by the defence gave any evidence on that issue. Thus, the defendant was liable for negligence for its failure to take any reasonable preventive measures to ensure that no damages would be caused to the plaintiffs' bungalow before commencing its construction works at the adjacent site. (paras 16, 18 & 19)

(2) As for the issue of quantum for damages, this court found that (a) the plaintiff's claim for expert and consultation fees as legitimate and the total fees of the engineers, valuers and quantity surveyors should be RM43,828.85; (b) it was legitimate for the plaintiff to claim rental charges while staying at No 1B, Gerbang Ampang Hilir and that rental of RM12,000 per month was fair and reasonable and in addition, the said premises had been renovated by the plaintiff which would give added value to it thus the total claim for rental allowed was RM1,230,246.58; (c) it was fair for the plaintiff to employ a watchman of the damaged and unoccupied premises since the plaintiffs were not staying there so as to avoid any vandalism or theft so the claim of RM88,000 was allowed; (d) it would cause the plaintiff much more if repair works were done so the amount of claim for demolition and rebuilding was reasonable therefore the claim for RM3,393,167 was allowed; (e) the cost of moving back into the property and amount of RM50,000 was allowed; (f) claim for loss in value of the property was disallowed because the subject property had not been sold hence the actual loss had not been realized and further, as the court had allowed the claim for rebuilding the property it would not be legitimate to claim for any loss in the value of the property; (g) the court was

not in favour of allowing claim for theft of items because it was due to the watchman's negligence that the items were stolen; (h) there was ample evidence that the damage to the property had caused severe hardship to the plaintiffs thereby resulting in the health conditions of the second plaintiff to deteriorate drastically thus the court allowed the claim of RM1,000,000 for general damages for mental distress, hardship etc; (g) in light of the behaviour and careless attitude of the defendant, this court allowed the plaintiff's claim for aggravated and/or exemplary damages against the defendant in the sum of RM500,000. (paras 20 & 21)

[Interest awarded at the rate of 8% p.a on the amount awarded from the date of filing of this suit to the date of realization; costs of this action to be paid by the defendant to the plaintiffs.]

Case(s) referred to:

Acton v. Blundell [1843] 152 ER 1223 ***(refd)***

Loh Siew Keng v. Seng Huat Construction Pte Ltd [1998] SCHC 197 ***(refd)***

Singapore Finance Ltd v. Lim Kah Ngam (Singapore) (Pte) Ltd and Eugene HL Chan Associates (Third Party) [1984] 2 MLJ 202 ***(refd)***

For the plaintiffs - David Lingam (HW Yip with him); M/s David Lingam & Co

For the defendant - BS Sidhu (Sharon Sidhu with him); M/s BS Sidhu & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Azmel Maamor J:

[1] In this case, the plaintiffs, who are husband and wife, are the owners of a property at No. 290A, Lorong Palas, Off Jalan Ampang, 50450 Kuala Lumpur on which is constructed a double storey bungalow house (the said property). The property is registered in the name of the wife (the 1st plaintiff) but the purchase of the said property was wholly financed by the husband the second plaintiff (PW1). Needless to say that the second plaintiff has beneficial interest of the said property. Both husband and wife had been living together in the said bungalow house together with their children until it was damaged by the defendant which led them to bring this action against the defendant.

Facts Of The Case

[2] Sometime in early March 1997 the defendant began to develop the land immediately adjacent to the said property to construct two 20 storey condominium blocks. Part of the initial works carried out by the defendant were piling activities for the construction of basement carparks which involved excavation and removal of soil. Such activities had caused movement and settlement of the underground soil which in turn caused damages to the plaintiffs' bungalow house which developed cracks in various parts of the building including the compound of the said bungalow. What had caused the cracks to the said bungalow house was not seriously disputed. In addition to the evidence of PW1, PW4 and PW5 the cause of cracks to the plaintiffs' bungalow house was also admitted by DW1, an engineer who had inspected the plaintiff's bungalow house.

[3] There do not appear to be any action taken by the defendant in the form of any precautionary or preventive steps and measures before commencing works on excavation and removal of soil, to ensure that no damage would be caused to the said bungalow house. None of the 4 witnesses called by the defence gave any evidence on that issue. Only when cracks had appeared in the plaintiffs' bungalow after the defendant had commenced excavation works that the defendant began to get his workers to inspect the damages to the plaintiffs' bungalow. Yet the defendant continued with its activities and only forced to stop activities for a while on being given stop work order by Dewan Bandaraya Kuala Lumpur. Because the cracks continued to get worse due to the fact that settlement of the underground soil had not fully stabilised the plaintiffs and their family, on the advice of their engineer, vacated the said bungalow house to stay in another house for fear of their safety. On inspection by the plaintiffs' engineer the bungalow had suffered structural damages particularly the existence of cracks on the floor area, the walls, column and beam.

Issue Of Negligence

[4] In this action the plaintiffs alleged that the defendant had been negligent in carrying out the construction works adjacent to their bungalow house. Para 7 of the plaintiffs' statement of claim stated 7 acts of negligence of the defendant namely:

A (a) Gagal untuk menjalankan sebarang atau apa-apa penyiasatan tanah yang cukup sebelum memulakan kerja pembinaan termasuk kerja cerucuk;

(b) Gagal untuk mengambil apa-apa langkah yang cukup untuk keselamatan penghuni/hartanah yang bersempadan dengan B kawasan pembinaan;

(c) Gagal untuk memberhentikan dan/atau menangguhkan kerja-kerja cerucuk/pembinaan walau pun mempunyai pengetahuan mengenai kerosakan yang ditimpa hartanah tersebut dengan keadaan yang merbahaya kepada jiwa dan keselamatan Plaintif C serta penghuni-penghuni Hartanah tersebut;

(d) Gagal untuk mengamalkan taraf kejuruteraan yang sewajarnya dalam projek pembinaan tersebut;

D (e) Gagal untuk memberi sebarang perhatian atau memberi perhatian yang secukupnya terhadap amaran-amaran yang diberikan oleh Plaintif;

(f) Gagal untuk mementingkan keadaan Hartanah tersebut dan penghuni-penghuni yang mendiami rumah-rumah yang E bersempadan dengan kawasan projek tersebut;

(g) Menjalankan kerja-kerja cerucuk/pembinaan dengan cara yang tidak professional, tidak munasabah tanpa jagaan, perhatian dan kemahiran yang sewajarnya dan tidak langsung menghiraukan kepentingan orang lain, khususnya pihak F Plaintif.

[5] As the cause of the damage to the plaintiffs' bungalow had not been disputed and in fact admitted by the defendant the only issue to be determined is whether there was negligence on the G part of the defendant in carrying out the construction work that led to damages caused to the plaintiff's bungalow. To do this I need to examine the evidence as regards the actions of the defendant before commencing the construction works. According to the evidence of PW1 the defendant only contacted the plaintiff H to request for permission to install "ground anchors" into the plaintiffs' property to secure the construction on the site. The action was not for the benefit of the plaintiffs but was in fact done for the benefit of the defendant's activities. Nothing appeared to have been done by the defendant to ensure that the I said bungalow house would not be damaged by the activities carried out by the defendant. As the plaintiff had alleged that the defendant had been negligent in carrying out the construction activities particularly the excavation and removal of soil from the

site it is therefore incumbent upon the defendant to show that it had done all the necessary steps to ensure that the plaintiff's bungalow at the adjacent property would not be damaged. No evidence had been given by any of the 4 witnesses called by the defence.

[6] The plaintiffs had called two engineers (PW4 and PW5) to give evidence as regards the cause of the damage to the plaintiffs' bungalow.

[7] Purnam Singh (PW4), a practicing engineer, in his statement said, as regards the most probable causes of the defects to the plaintiffs' bungalow:

> Where buildings, roads or underground services are close to an excavation the effects of these structures of movements due to excavation and the construction of adjacent facilities need to be carefully assessed. The present case of the existing bungalow which is considered close to the on-going construction of the proposed two blocks of twenty-storey condominium blocks may be analysed keeping in mind the following:
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> (i) the possible effects of pumping ground water from excavation can cause settlement of the ground surface around the excavation.
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> (ii) settlement surrounding excavated basements may cause settlement sufficient to cause structural damage to buildings near the excavation and cracking of drains, perimeter fence and other underground services.
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> In deep basement excavations, supported by sheet piling system settlement may be caused by:
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> (i) a fall of the original water table level surrounding the excavation due to pumping during construction;
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> (ii) loss of soil due to erosion and washout of fines;
>
> (iii) possible lateral movements due to elastic deflection of sheeting members, walings and struts or anchors which support the surface.

[8] PW4 went on to state his professional conclusion as to the cause of the damage:

> Based on the monitoring results obtained between the first visual survey of June 1997 and the last survey of December 1997, it can be conclusively established that the damage to the property in question is related to the on-going construction works in the

A adjacent property. According to interviews with Mr. Jagjit Singh and Mr. Lim Chooi Kui, (PW3 and PW1 respectively), the first signs of damage to the property concerned were during the piling works in the adjacent property ie, the construction of the two 20-storey condominium blocks.

B It is my conclusion therefore that the cause of damage/defect to the Property must be due to the ongoing works on the site adjoining the Property.

[9] Hence in the light of the clear cause of action alleged by the C plaintiff against the defendant for negligent acts particulars of which had been enumerated in para 7 of the statement of claim the defendant should prove to the satisfaction of the court that it had taken all the necessary steps and measures to prevent possible damages to said bungalow adjacent to the defendant's D construction site. No such evidence had been adduced by any of the defence four witnesses.

[10] Nonetheless the defence counsel submitted that the defendant could not be held liable for the damages caused to the plaintiffs' bungalow. He based his argument on the authority of a E 19th century case of *Acton v. Blundell* [1843] 152 ER 1223. The facts of this case were that the plaintiff sunk a well in his property for raising water for the working of his mill. Subsequently, the defendant sunk two coal pits in his land adjacent to the plaintiff's property. The result was that the supply of water to the plaintiff's F mill was considerably diminished and the plaintiff sued the defendant for interference with his right of enjoyment over the water flowing under his land. It was ruled by the court that a man may abstract water under his land which percolates in undefined channels to whatever extent he pleases, notwithstanding that this G may result in the abstraction of water percolating under the land of his neighbour and, thereby, cause injury to him

[11] This principle was adapted by the Singapore case of *Singapore Finance Ltd v. Lim Kah Ngam (Singapore) (Pte) Ltd. and* H *Eugene HL Chan Associates (Third Party)* [1984] 2 MLJ 202. In this case the defendants were in the course of erecting a 13-storey building and passed sheet piles surrounding their land. During that period the owners of building in the neighbourhood complained that cracks appeared on their building.

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[12] The defendant contended and admitted that ground de-watering of the plaintiffs' soil had been caused by the defendants excavation works, but the defendant maintained that such de-

watering, that is the flow of water from the defendants' soil into the excavation hold through indeterminate or undefined channels, was due to the forces of nature and the forces of gravity and was neither avoidable nor was it due to any positive acts done by the defendant their servants or agents. The defendant contended that the damage to the plaintiffs' building was *damnum sine injusia* (damage without legal injury). The court dismissed the plaintiffs' claim.

[13] However there was a subsequent case in Singapore which ruled the principle of *Acton v. Blundell* to be no good law to be applied to modern Singapore and therefore should not be followed. It is the case of *Loh Siew Keng v. Seng Huat Construction Pte. Ltd.* [1998] SGHC 197. In this case the defendant carried out certain sewerage works which included replacement of an underground sewer line adjacent to the plaintiff's house. The plaintiff brought an action for negligence and nuisance arising from the defendant's excavation of the trench next to the plaintiff's house as cracks penetrated the walls on the 1st and 2nd floor of the plaintiff's house as well as a continuous crack line on the external floor and at other parts of the house.

[14] In his judgment Chan Seng Onn JC gave his view on the ruling of *Acton v. Blundell*:

> The result then is that I have to consider whether the Singapore Courts should adapt the rule in *Acton v. Blundell* as a matter of choice. On careful consideration, I came to the conclusion that it should not be the law of Singapore. With respect I found myself unable to agree with Lai Js decision on this point. In *Acton v. Blundell* the Plaintiff complained of being cut-off from the water caused by the Defendant's action; it was not a claim of physical damage to his land caused by loss of support.
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> ... I do not think that the rule in *Acton v. Blundell* can be justified today. It may be that in old England, the courts had to take into account the rights of the landowners to extend water percolating underground for drinking purposes and farmland irrigation. Even if soil subsidence of adjacent land resulted, I do not think the damage, if any, would be significant. I think that the rule is clearly ill adopted to conditions in Singapore, where many areas are densely built up, with adjacent building very close to, if not adjoining each other, and where there is hardly anymore open land farming activities being carried out. Drinking water is no longer drawn from wells sunk into the ground. Water is supplied by an extensive system of water pipes to distribute water to all who need it. ... I am not inclined to follow *Acton v. Blundell*

A because there is insufficient consideration given to the rights of adjacent landowners. One has to balance the rights of the landowner to support and the proprietary right to exploit one's land eg, the right to pump water.

B ... To conclude that those who abstract percolating water have an unbridled licence to wreak havoc on their neighbours would be harsh and entirely out of keeping with the law of torts as it exist today.

[15] I am in full agreement with the views expressed by Chan C Seng Onn JC in the Singapore case of *Loh Sim Keng (supra)*. The drastic change in the living style of people since ancient England in the 19th century to those in the 21st century would require a change in the application of the law. Principles of law that are archaic as the one propounded in *Acton v. Blundell* should no D longer be applied to modern society like Kuala Lumpur where, like Singapore, buildings are very close to each other. And, as observed by Chan JC, drinking water are no longer obtained from wells. The modern society are supplied with pipe water to their houses. Hence the factor that one has to bear in mind in doing E any construction works in one's land is to ensure safety and security of one's neighbour's property especially the house the neighbour lives in. Reasonable steps and measures must be taken to ensure no damage would cause to one's neighbour's house before commencing any construction works. Failing to take such F precautionary measures before commencing such construction works would render one to be actionable for the tort of negligence.

[16] In the instant case in order for the defendant to escape G liability for the tort of negligence the defendant must show sufficient evidence that it had taken the necessary steps and measures to ensure no damages were done to the plaintiff's bungalow located immediately adjacent to the defendant's work site. Having regard to the activities carried out at the site which H included piling works and excavating and removing of soil that caused damages to the plaintiffs' bungalow the defendant could not and should be heard to say that it is not liable for the damage to the plaintiff's bungalow. It is a common knowledge that whenever any activities of sheet piling, excavating and removal of I soil are carried out in any area it would cause movement of the water level of the land in the surrounding area. The likely consequence would be that any building constructed on the neighbouring land would develop cracks depending on the degree

of the piling, the excavation and removal of soil activities being carried out. A developer like the defendant who employs engineers for carrying out such construction works must be fully aware that the activities it carried out at the work site would likely cause damages to the plaintiffs' bungalow house and should therefore take the necessary steps to prevent damages to the plaintiffs' house.

[17] But the defendant in the instant case chose not to take any such preventive measures before commencing the construction works of sheet piling, excavation and removal of soil. There it is of no surprise that the defendant's activities had caused major damages to the plaintiffs' bungalow.

[18] The damages to the plaintiffs' bungalow that had been caused by the activities are so severe that on the advice of the plaintiffs' engineers it was no longer safe for the plaintiffs to continue to stay in the house. Not only major and minor cracks to the building had developed the electrical system had also failed and the water supply had also been adversely affected due to the damages to the walls where the electrical and water systems were hidden. It was my finding that the bungalow was no longer safe for habitation. The plaintiffs were quite right in deciding to vacate the house for fear of their safety and convenience.

[19] In the light of the facts and circumstances as I have mentioned above I found the defendant liable for negligence for its failure to take any reasonable preventive measures to ensure that no damages would be caused to the plaintiffs' bungalow before commencing its construction works at the adjacent site.

Issue Of Quantum

[20] After having ruled that the defendant was liable for negligence I proceeded to hear witnesses from both parties as regards the issue of quantum of damages payable by the defendant to the plaintiff. The plaintiff called 5 witnesses some of whom had given evidence earlier when the case proceeded on determining the issue of liability. The defendant called 3 witnesses. I also asked counsels for both parties to give their written submissions. Based on the evidence adduced and submissions of both counsels before me I arrived at the decision on quantum on the various items claimed by the plaintiff as follows.

1. Expert and Consultation Fees

I find the plaintiff's claim under this Item is legitimate. And the amount claimed is reasonable. However the total fees of the engineers, the valuers and the quantity surveyors should be RM43,828.85 instead of RM44,828.85.

2. Rental

The plaintiff's claim for rental at the premises No. 1B, Gerbang Ampang Hilir, 55000 Kuala Lumpur and No. 7. Taman U Thant Dua, 55000 Kuala Lumpur is legitimate. It is also legitimate for the plaintiff to claim rental charges while staying at No. 1B, Gerbang Ampang Hilir even though the property was subsequently purchased by the plaintiffs' family company. The plaintiffs are only claiming the rental and not the purchase price of the property. The rental of RM12,000 per month is fair and reasonable, taking into consideration that the rental of the same premises before purchased by the plaintiff was RM14,000 per month. In addition, the said premises had been renovated by the plaintiff which would give an added value to it. The total claim for rental allowed is RM1,230,246.58.

3. Watchman/Guard Wages

The claim under this item is legitimate. It is only fair for the plaintiff to employ a watchman of the damaged and unoccupied premises since the plaintiffs and their family were not staying there, so as to avoid any vandalism or theft to it. The amount claimed is reasonable. I allow the claim of RM88,000 under this item.

4. Cost Of Demolishing And Rebuilding Of Property

I agree that based on the facts and circumstances of this case it would not be safe to continue to stay in the said property. Doing repair works to the existing building may not be feasible under the circumstances. I agree with the opinion of plaintiff's expert witness that it would cause the plaintiff much more if repair works are done instead of demolishing and rebuilding it. The nature of the soil would require drastic foundation works to be carried out with proper reinforcement. The amount of claim for demolition and rebuilding is in my view fair and reasonable. I therefore allow the claim for RM3,393,167 under this item.

5. Cost Of Moving Back Into The Property

This item is indisputable and the amount claimed is also reasonable. I therefore allow the claim of RM50,000 under this item.

6. Loss In The Value Of Property

I am inclined to disallow this claim for loss in value of the property. The subject property has not been sold. Hence the actual loss has not been realised. As I have allowed the claim for rebuilding the property it would not be legitimate to claim for any loss in the value of the property.

7. Theft Of Items From Property On 27 October 1998

I am also not in favour of allowing this item. At the time of theft the premises was being guarded by the watchman. He did not see the people entering the premises. It must be due to his negligence that the Items were stolen.

8. General Damages For Mental Distress, Hardship etc

There are ample evidence that the damage to the property had caused severe mental distress and hardship to the plaintiffs thereby resulting in the health conditions of the 2nd plaintiff to deteriorate drastically. The whole members of the plaintiffs' family had faced great hardship, getting transferred from one house to another. The 1st plaintiff, who had personally supervised the construction of the house, must be feeling very painful and sad to see the house being damaged due to the acitivities carried out by the defendant. I allow the claim of RM1,000,000 under this Item.

9. Aggravated And/Or Exemplary Damages Against The Defendant For Their Conduct In The Matter

On the facts of this case it is quite obvious that the cause of damage to the plaintiff's property was due to the excavation works carried out by the defendant at the site adjacent to the plaintiffs' bungalow. And the damage began to appear during the excavation works carried out by the defendant. The matter could have been easily settled if at that time the defendant were to admit liability and agree to do the necessary repair and ratification works as well as necessary preventive measures. The defendant refused to admit that they were

liable for its action. Instead the defendant preferred to wait for the plaintiff to bring court action knowing that this would take years to complete. The longer the delay the more advantageous would it be to the defendant. As for the plaintiffs, the longer the delay the more painful would be their sufferings. This is how the defendant in this case actually behaved. In addition to that having considered the proximity of the plaintiffs' property to the excavation site, adequate tests and precautionary measures should have been taken by the defendant to ensure that the foundation of the plaintiff's property would not be affected by their excavation activities. The defendant should have determined the type of foundation on which the plaintiff's house was constructed *vis-a-vis* the nature of the soil found there, and then to take appropriate steps to ensure that the plaintiff's property would not be damaged. No such tests or any preventive measures were carried out by the defendant on the plaintiff's property. Any reasonable person, more so a developer of the defendant's standing, would have foreseen the consequence of the excavation works on the plaintiffs' property. This clearly indicates couldn't care less attitude of the defendant which is most uncalled for. The sole concern of the defendant was to quickly complete the construction and reap as much benefits with the minimum amount of costs incurred. It is a very selfish attitude most undesirable in a community we Malaysians are used to. The behaviour and attitude of developers towards their neighbours have been so degrading that appropriate authorities should take necessary steps to check their activities to ensure that their neighbours are not adversely affected. In the light of such behaviour and attitude of the defendant towards the plaintiff, I allow the claim for aggravated and/or exemplary damages against the defendant in the sum of RM500,000.

[21] I thereby allowed the plaintiff's claim for damages in the sum of RM6,306,242.43. I award interest at the rate of 8% p.a. on the amount awarded from the date of filing of this suit to the date of realisation. I order that the costs of this action be paid by the defendant to the plaintiffs.